MOTION FILED

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No. 80-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,

Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

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NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

Interest of Amicus Curiae

EEI is the national association of investor-owned electric utility companies in the United States.[2] Its members serve 99.1% of all customers of the investor-owned segment of the utility industry and 77.1% of the nation's electricity users. The decision by the New Hampshire Supreme Court

1. While the other parties have consented to the filing of this brief *amicus curiae*, the New Hampshire Public Utilities Commission, the State of New Hampshire, and the New Hampshire Legislative Utility Consumers' Council have not consented to the filing of this brief. Letters from the consenting parties have been filed with the Clerk of this Court.

2. The positions expressed herein, and in the appended brief *amicus curiae*, are those of the EEI members generally. Public Service Company of New Hampshire disassociates itself from the positions expressed herein and in the appended brief.

intimately concerns two matters of vital interest to EEI and its members: the revival of state constraints on the interstate generation and transmission of electricity,[3] and the disruption of the comprehensive federal regulatory scheme for regulation of wholesale electric rates. Because the interest of public utilities nationwide is not represented by any party to this action, EEI seeks this Court's permission to represent this crucial interest through the annexed brief.

The decision below allows the State of New Hampshire to withhold from the citizens of other states the economic benefit of hydroelectric resources located in New Hampshire. For many years, the low-cost electric energy produced from these resources has flowed throughout the New England interconnected electric systems interchangeably with the other electric energy produced in New Hampshire and in all other New England states. If upheld, the decision below will disrupt wholesale rates and power pooling arrangements currently approved by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act and will cause the wholesale costs of electric energy in the other New England states to increase.

More importantly, from a national viewpoint, the decision below supports simple protectionism by individual states of electric energy resources and thus poses considerations broader than those of immediate concern to the parties in the present case. This nation's basic indigenous energy resources – coal, oil, gas, uranium, and water power -- are not uniformly distributed; some states are better endowed than others. If the decision below is allowed to stand, other states will be encouraged to use existing legislation or to adopt new legislation to join New Hampshire in the practice of hoarding the benefits of energy and fuel

3. *See, e.g., Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927); *c.f., West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

supply resources so vitally important to reliable and economic energy supplies nationwide.[4] Other energy-rich states will be encouraged to withhold the economic benefits of their energy resources from the citizens of less fortunate states. Those states deprived of such benefits will be tempted to react insofar as they are able to do so, if only to offset otherwise increased energy rates. The decision below will give rise to construction of the very barriers to commerce which the Commerce Clause has prevented.

As a national association, EEI is in a position to reflect a broader spectrum of interest and impact than the parties herein. The present case impacts upon the public interest of all citizens affected by the regulation of electric utilities, as well as upon the national economic interest in the reliability and equitable availability of national energy resources. The annexed brief *amicus curiae* demonstrates from a national perspective the extent of this impact and seeks to assist the Court to weigh the public interest in noting probable jurisdiction herein.

4. *See, e.g., Commonwealth Edison Company* v. *Montana*, No. 80-581, probable jurisdiction noted, ___ U.S. ___, 49 U.S.L.W. 3428 (Dec. 9, 1980) (state coal severance tax).

Conclusion

For the reasons set forth above, and in the annexed brief, EEI requests leave to file the annexed brief as *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Acting under an archaic 1913 state statute never before invoked for this purpose, the New Hampshire Public Utilities Commission ("PUC") prohibited New England Power Company ("NEP") from continuing to sell outside the state energy generated by NEP at its federally-licensed hydroelectric projects in New Hampshire. NEP has appealed from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented by this appeal are:

1. Does the application of the New Hampshire statute to bar the export of hydroelectric energy from the state constitute an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution?

2. Does the use of the New Hampshire statute to force NEP to file with the Federal Energy Regulatory Commission to reduce wholesale rates to New Hampshire customers violate the Federal government's exclusive jurisdiction over wholesale sales of electricity in interstate commerce?

PARTIES TO THE PROCEEDING BELOW

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

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No. 80-1208

IN THE

Supreme Court of the United States

October Term, 1980

NEW ENGLAND POWER COMPANY,

Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*,

Appellees

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed by Appellant New England Power Company ("NEP") on January 19, 1981 ("NEP Jurisdictional Statement") in the captioned appeal from a judgment of the New Hampshire Supreme Court entered on December 23, 1980, upholding the validity of a New Hampshire statute as applied by the New Hampshire Public Utilities Commission ("PUC") to bar the export of hydroelectric energy generated within the state.[1]

1. The positions expressed herein are those of the EEI members generally. Public Service Company of New Hampshire disassociates itself from the positions expressed herein.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (Appendix A to the NEP Jurisdictional Statement, pp. 1a-14a ("NEP App. A")) is not yet reported. The PUC's Report and Order dated August 27, 1980 (Appendix B to the NEP Jurisdictional Statement, pp. 15a-24a ("NEP App. B")) and its Report and Order dated September 19, 1980 (Appendix C to the NEP Jurisdictional Statement, pp. 25a-40a ("NEP App. C")) are also unreported.

JURISDICTION

This Court has jurisdiction, under 28 U.S.C. § 1257(2), of this appeal from a judgment of the New Hampshire Supreme Court, because that Court upheld the validity of a state statute as applied by the PUC against claims that the statute violates both the Constitution and the laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of the New Hampshire Supreme Court was docketed by its clerk. A notice of appeal was timely filed on January 12, 1981 (Appendix D to the NEP Jurisdictional Statement, p. 41a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case challenges the validity of the New Hampshire hydroelectric export statute (NH RSA 374:35), as applied, under the Federal Power Act (16 U.S.C. §§ 792-824k) and the Commerce Clause of the United States Constitution (art. I, § 8, cl. 3).

The text of NH RSA 374:35 is set out at page 2 of the NEP Jurisdictional Statement, the relevant provisions of Federal Power Act, in Appendix E, pp. 42a-46a, thereof, and the Commerce Clause is set out at page 3 of the NEP Jurisdictional Statement.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute is the national association of investor-owned electric utility companies, including most of the utility companies serving New England. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. In order to serve these customers reliably, EEI's members are interconnected in a complex national network linking 47 of the 48 continental states. As discussed in the foregoing Motion for Leave to File, the decision of the New Hampshire Supreme Court from which this appeal is taken concerns vital interests of EEI and its members – unencumbered access to the nation's energy and fuel supplies and the ability of the nationwide electrical network to function reliably, efficiently and economically to meet the electrical demands of all customers.

STATEMENT OF THE CASE

The salient features of the decisions below are described in the Statement of the Case presented in the NEP Jurisdictional Statement at pages 3 to 7. That description need not be repeated here.

The consequences of the decision below are not limited to the named parties. The decision has serious implications for interstate power transactions nationwide. Interstate power transactions are a major component of the complex pattern of utility industry coordination for reliability and economy, which includes the formal and informal coordination of transmission and generation facilities, through state and regional power pools and regional electric reliability councils. *The 1970 National Power Survey*, Part I, Chapter 17 (Federal Power Commission, 1970). Indeed, electrical facilities in all states in the continental United States, with but one exception, are interconnected across state lines to form complex interstate networks. All of the New England states are electrically interconnected and

bulk electric supply is coordinated through a single, centrally-controlled network known as NEPOOL.[2] (NEP App. A, p. 3a).

Transactions at wholesale among the interconnected systems are regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to Part II of the Federal Power Act. Should each state seek instead to exploit its parochial interests in local energy supplies and restrict these transactions, directly or indirectly, this interconnected network, so vital to reliable and economical electrical service, would collapse. The resulting deterioration in reliability of electric service and increases in costs to the customers are detrimental to the interests of utilities and of their customers throughout the nation, and ultimately, to the states themselves.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Regardless of how it is rationalized, NH RSA 374:35, as applied, has an impermissible effect. The PUC purported to withdraw permission for NEP to "transmit hydroelectric energy from within the boundaries of the State" (NEP App. C, p. 40a) and directed NEP to sell that energy within the state "to enable New Hampshire to regain the benefit of its hydroelectric power"[3] (NEP App. A, p. 14a). The PUC's application of NH RSA 374:35 can have only one of two meanings: either it is a ban on exports or it is a direction to NEP to provide favorable wholesale rates to New Hampshire customers. Therefore, NH RSA 374:35 is

2. As this Court has recognized, such power-pooling arrangements confer significant benefits, in terms of reliability and cost of service, on their participants. *See Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515, 519 (1971).

3. The use of the phrase "its hydroelectric power" is no longer warranted, because the hydroelectric energy generated by NEP is produced at federally-licensed projects located on a navigable river. *See First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946).

either repugnant to the Commerce Clause, or it is an impermissible attempt by the state to intrude upon exclusive federal jurisdiction to set wholesale rates under Part II of the Federal Power Act.

Moreover, given the interconnected nature of the New England electrical network, which includes New Hampshire, no "exportation of hydroelectric energy" within the meaning of § 201(b) of the Federal Power Act has been shown to be present on the facts of this case.

1. New Hampshire's attempt to prevent the interstate transmission of electricity violates the Commerce Clause.

As this Court explained in *Hood & Sons* v. *DuMond*, 336 U.S. 525, 537-8 (1949), "this principle that our economic unit is the Nation . . . has as its corollary that the states are not separable economic units." This analysis is uniquely appropriate in this case, which involves the generation and transmission of electricity. Forty-seven of the 48 continental states are electrically interconnected.[4] More importantly, all of New England – including New Hampshire – is electrically interconnected into a single network known as NEPOOL, and all generation in the grid is centrally dispatched as a single system.[5] In short, New Hampshire is not a separable unit electrically or economically.

In order to "regain" the economic benefit of hydroelectric energy generated within New Hampshire's borders, the PUC withdrew permission, for the first time in the 67 years since NH RSA 374:35 was enacted, for NEP "to transmit hydroelectric energy from within the boundaries of the

4. *See Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 471 (1972) (Douglas, J., dissenting).

5. *See New England Power Pool Agreement*, Opinion 775 (FPC, 1976). Nowhere in their opinions do the New Hampshire Supreme Court or PUC mention, much less quantify, the economic benefits New Hampshire consumers derive from NEPOOL's economic dispatch system, or from the outside system support and increased reliability which NEPOOL provides to New Hampshire and its citizens.

State." (NEP App. C, p. 40a). The New Hampshire Supreme Court upheld this application of the statute. (NEP App. A, pp. 12a, 14a).

This is "simple economic protectionism." *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). It is invalid *per se*. *Id.* "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624. This is precisely what the application of NH RSA 374:35 has been used to accomplish in this case.

NH RSA 374:35 on its face and in practical effect discriminates against interstate commerce. *See Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). Far from regulating "even-handedly with only 'incidental' effects on interstate commerce," the intended effect of NH RSA 374:35 is to choke off interstate commerce to capture an economic benefit for New Hampshire residents.

Although there is, therefore, no reason even to undertake the further analysis spelled out in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (and *see Hughes* v. *Oklahoma*, *supra*, at 336), such an analysis demonstrates that, as applied, NH RSA 374:35 serves no legitimate purpose. The PUC stated "the public good can be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources." (NEP App. C at 35a). The former reason is parochial protectionism and is an illegitimate attempt to isolate New Hampshire from the national economy. *Philadelphia* v. *New Jersey*, *supra*, at 624. The latter is an attempt to afford New Hampshire residents a "preferred right of access over consumers in other States to natural resources located within its borders." This is impermissible. *Philadelphia* v. *New Jersey*, *supra*, at 627; *Hughes* v. *Oklahoma*, *supra*, at 338; *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

> It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Philadelphia v. *New Jersey, supra*, at 628. The problems to which NH RSA 374:35 was applied are common to all states where electricity is used. Therefore, NH RSA 374:35, as applied, violates the Commerce Clause.[6]

2. New Hampshire cannot use NH RSA 374:35 to force the FERC to establish new wholesale rates.

Although it sought strenuously to characterize the PUC's application of NH RSA 374:35 as something other than wholesale ratemaking,[7] the New Hampshire Supreme Court could not ignore the reality of the situation:

> Its [NH RSA 374:35] purpose is to give New Hampshire the benefit of that power of which its residents now only get about six percent.
>
> • • •
>
> Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this State, would be substantial.

6. Section 201(b) of the Federal Power Act is not an independent source of state power in this area. Rather, as this Court stated in an analogous context involving § 7 of the Bank Holding Company Act, 12 U.S.C. § 1846, it merely defines "the extent of the federal legislation's preemptive effect on state law . . . [and] applies only to state legislation that operates within the boundaries marked by the Commerce Clause." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S 27, 48 U.S.L.W. 4638, 4644 (June 9. 1980). As applied, NH RSA 374:35 operates completely outside those boundaries.

7. "This is not a control of rates but rather a control of the assignment of the power." (NEP App. A, p. 12a).

(NEP App. A, pp. 11a, 13a). *Indeed, the New Hampshire Supreme Court went so far as to remand the matter for NEP to make appropriate rate filings to implement NH RSA 374:35.* (NEP App. A, p. 14a).

Under Part II of the Federal Power Act, the Federal Energy Regulatory Commission has plenary jurisdiction over all wholesale sales of electricity in interstate commerce except those "made explicitly subject to regulation by the States." *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 216 (1964) (*"City of Colton"*). The states have no power to regulate sales such as NEP's sales at wholesale. *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927) (*"Attleboro"*).

> Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales.

United States v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953).

Thus, New Hampshire has no power to regulate wholesale sales of electricity. NEP's sales are clearly and admittedly (NEP App. A, p. 3a) wholesale sales in interstate commerce. *City of Colton, supra*, at 215-6. New Hampshire cannot regulate the rates for such sales directly or indirectly. *United States* v. *Public Utilities Commission of California, supra*, at 311. New Hampshire's attempt to apply NH RSA 374:35 to force NEP to file new rates with FERC, as "appropriate," reflecting a new cost base forced upon NEP by depriving it and its customers in other New England states of low-cost hydroelectric energy is nothing more than

an impermissible attempt to accomplish by indirection what the state is powerless to achieve directly.

Section 201(b) of the Federal Power Act[8] does not create an exception to this rule; nor is its application even appropriate to the facts of this case.

Section 201(b) was not drafted with state rate regulation in mind. *United States* v. *Public Utilities Commission of California, supra,* at 301, n.4. Section 201(b) is not a grant of jurisdiction.[9] *Id.* at 304. Rather, it assumed and did not pass upon the validity of those laws to which it referred. However, such laws as NH RSA 374:35 are valid only insofar as they operate within the Federal Power Act itself or within the limits of the Commerce Clause. *Lewis* v. *BT Investment Managers,* 447 U.S. 27, 48 U.S.L.W. 4638 (June 9, 1980). Similarly, although § 20 of the Federal Power Act was asserted to allow states to regulate rates for power sold from federally licensed projects, this Court found that § 20 was not a grant of state jurisdiction, but merely assumed the existence of a state power later shown not to exist. *U.S.* v. *Public Utilities Commission of California, supra,* at 304. As with § 20, later cases show that NH RSA 374:35, as applied, cannot operate consistently with the plenary federal jurisdiction over wholesale sales. *City of Colton, supra.*

In any event, § 201(b) has not been demonstrated to be applicable to the facts of this case. The reference in § 201(b) to the "exportation" of hydroelectric energy requires the tracing of electricity from a particular generating source.

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8. Section 201(b), 16 U.S.C. § 824(b), provides in relevant part:
The provisions of this Part [II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

9. *Cf. First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 177 (1946) (comparing §§ 9(b) and 27 of the Federal Power Act).

Although this concept may have had technological validity when § 201(b) was enacted and before the full development of today's complex interstate grid (*see, e.g., Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61 (1943); and *United States* v. *Public Utilities Commission of California, supra,*, at 302), the tracing of electricity to its source on an interconnected system is technically impossible and has since been disavowed as a legal concept by this Court. *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972). Federal jurisdiction over electricity follows the inextricably mixed flow of electrons rather than a constructive legalistic test. *City of Colton, supra,* at 209 n.5. The NEP hydroelectric energy flows directly into and is dispatched by the NEPOOL system, which includes Public Service Company of New Hampshire, the principal retail supplier in the State. (NEP App. A, p. 4a). Even if it were possible or appropriate to trace this energy, there is no evidence that any hydroelectric energy actually leaves New Hampshire. In short, the concept of exportation envisioned in 1913 ignores the realities of the modern interconnected interstate electrical system of which New Hampshire is a part.[10]

10. Indeed, the New Hampshire Supreme Court recognized this fact when it characterized this case as "a control of the assignment of the power." (NEP App. A, p. 12a).

CONCLUSION

For the foregoing reasons as well as those expressed by NEP in its Jurisdictional Statement, the Court should, if it does not summarily reverse, note probable jurisdiction.

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